

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE STEPHEN V. WILSON, U.S. DISTRICT JUDGE PRESIDING

VENTURA CONTENT, INC., LIMITED,)

Plaintiff,)

vs.)

No. CV 11-5912-SVW

MOTHERLESS INC., etc., et al.,)

Defendants.)

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

MONDAY, NOVEMBER 1, 2012

DEBORAH K. GACKLE, CSR, RPR
United States Courthouse
312 North Spring Street, Room 402A
Los Angeles, California 90012
(213) 620-1149

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1 **LOS ANGELES, CALIFORNIA; MONDAY, NOVEMBER 1, 2012; 2:00 P.M.**

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4 THE CLERK: Item 1, CV 11-5912-SVW, Ventura Content,
5 Limited versus Motherless, Incorporated, et al.

6 Counsel, please state your appearances.

7 MR. AFRASIABI: Good afternoon, Your Honor. Peter
8 Afrasiabi on behalf of the plaintiff, Ventura Content.

9 MR. ARLEDGE: Chris Arledge, also behalf of the
10 plaintiff.

11 MR. RICHMAN: Good afternoon, Your Honor. David
12 Richman on behalf of defendants.

13 THE COURT: When we had our initial pretrial
14 conference on Monday of this week, based upon some of the
15 arguments and also based upon some of the court's independent
16 research, it now appears to me the plaintiff has stated a case
17 of direct infringement, because there is no issue about the
18 copyright and -- of the films and the only question that I had
19 was with respect to whether the uploading of the films onto the
20 Motherless website would satisfy the second element of direct
21 infringement, that is, that the defendants reproduced, prepared
22 derivative works from, disputed, performed or displayed a
23 copyrighted work without the authority of the copyright holder;
24 and here, it's pretty plain from Ninth Circuit authority and
25 other authority that what was done was, at a minimum,

1 displaying the works, and that's supported by the teaching of
2 the *Perfect 10* case in the Ninth Circuit and other circuits.

3 So there are a number of questions that deal with
4 contributory infringement and with vicarious infringement, but
5 with regard to both contributory infringement and vicarious
6 infringement, one element is that direct infringement occurred.
7 So it seems pointless to delve into vicarious infringement or
8 vicarious -- contributory infringement because if there is no
9 direct infringement, there can't be those other types of
10 infringement.

11 So that means that the litigation will concern the
12 safe harbor defense, defendant's safe harbor defense, and there
13 it is the defendant's burden, and there are a number of factors
14 that have to be satisfied, and there have been no summary
15 judgment motions filed, even though I seem to recall, at an
16 earlier stage in the proceeding, it seemed to be me that
17 summary judgments might be productive.

18 In any event, let me ask you, Mr. Richman, some
19 questions about the safe harbor defense. The first aspect is
20 that you have to a service provider; I think it's obvious you
21 that, so you satisfy that. The second element, that the
22 infringement occurred by reason of the storage at the direction
23 of a user; I think you satisfy that element. The third is that
24 you have actual knowledge. My inclination is to think that
25 there's no evidence that you had actual knowledge, and

1 especially in light of the submission that I directed on Monday
2 that there are no copyright indicia on the films or watermarks,
3 so you satisfy that. There is authority that actual knowledge
4 cannot be found merely because a service provider has general
5 knowledge, that its services could be used to post infringing
6 material, so that doesn't appear to be something that will be
7 litigated. The next element is whether the infringer was aware
8 of facts or circumstances that indicated from which the
9 infringing activity is apparent, and there I think you would
10 satisfy that that because there were no -- again, there were no
11 marks or indicia on the infringing material. Did you receive a
12 financial benefit directly attributable to the claimed
13 infringement? There I have some questions.

14 Is the -- and I'm not accepting this at this moment
15 at face value, but at least I want to understand your position.
16 Does the defendant, Motherless, charge a flat fee for access to
17 its site, or is its revenue based solely upon advertising
18 revenue?

19 MR. RICHMAN: It is both.

20 THE COURT: Both.

21 MR. RICHMAN: But the flat fee is not mandatory, it's
22 discretionary.

23 THE COURT: What do you mean?

24 MR. RICHMAN: What I mean is, is that there are --
25 you can be a member of the website, or you can be a nonmember.

1 Only members pay a flat fee.

2 THE COURT: What's the advantage of -- why would I
3 want to be a member if I can access the website without being a
4 member?

5 MR. RICHMAN: There's two advantages that I can think
6 of off the top of my head. The first is that as your level of
7 memberships increases -- because there is also a premium
8 membership -- you see less ad.

9 THE COURT: All right.

10 MR. RICHMAN: The second benefit is that a member is
11 allowed to delete his or her own content, whereas a nonmember
12 is not.

13 THE COURT: I see.

14 MR. RICHMAN: Those are the two immediate ones.

15 THE COURT: Just one moment.

16 And then the next one is whether the defendant had
17 the right and ability to control the claimed infringement.
18 This seems to be related to the knowledge requirement before --
19 as mentioned before. And then next element is that the
20 defendant interfered with standard technical measures used by
21 copyright owners to identify or protect copyrighted works.

22 How would you answer that, or respond to that
23 element?

24 MR. RICHMAN: My response is that there's absolutely
25 no interference whatsoever.

1 THE COURT: In other words, there's no program set up
2 to present some barrier from a copyright holder to determine
3 whether or not there is copy -- whether or not its copyrighted
4 material is present on your site.

5 MR. RICHMAN: That is correct. And, in fact, that is
6 how Ventura found the 33 clips. They went onto the website and
7 searched using key words related to their films and found the
8 clips themselves. So I argue -- it's my position that that
9 shows that there's -- that's an important factor showing no
10 interference.

11 THE COURT: All right. And last, that the defendant
12 site reasonably adopted and implemented and informed its
13 members of a policy that for -- that provides for the
14 termination in appropriate circumstances of members who are
15 repeat infringers.

16 How would you respond to that element?

17 MR. RICHMAN: We have adopted and implemented that
18 policy.

19 THE COURT: So having responded as you have, and as I
20 said, I am, in effect, exploring summary judgment sua sponte
21 stay, which I'm allowed to do at a pretrial hearing; the Ninth
22 Circuit has made that plain several times, most recently in the
23 case of *Norse, N-o-r-s-e, versus City of Santa Cruz*, 629 F.3d
24 966 at 971. But in that light, while I have identified that
25 seems to be a ripe area for summary judgment, summary judgment

1 hasn't been made.

2 Given your responses, if they're accurate, it seems
3 unlikely that the plaintiff will be able to defeat summary
4 judgment, but on the other hand, this *Norse* case also teaches
5 that I give the plaintiff an opportunity to do so. So it seems
6 to me that you ought to make a motion for summary judgment on
7 the safe harbor.

8 MR. RICHMAN: I would love to.

9 THE COURT: Yeah. I asked you that awhile ago. So
10 what I'm going to do, since I told you I'm going to bifurcate
11 the fourth claim involving that estate claim, and I'm going to
12 give you -- I'll give you ten days to make a summary judgment
13 motion. I'll vacate the trial date for next week.

14 Set up a hearing date.

15 THE CLERK: Yes, Your Honor.

16 THE COURT: Yes.

17 THE CLERK: Filing of the motion will be November 13;
18 the opposition will be November 20th; the reply will be
19 November 27th; with a hearing on December 10th at 1:30.

20 THE COURT: And let me request that the plaintiff
21 consider what was just said, because there's no point in
22 litigating a summary judgment that is not at issue. I am going
23 to issue an order which informs the party of some of my
24 thinking on the legal issues, with the authority. I'm not
25 going to get into it in any great depth now. Consider what

1 I've said. If you think I'm wrong, then by all means challenge
2 me and pursue it, but if there's nothing there, then pursue
3 your state claim somewhere else.

4 And I'm going to try and get this out to you in the
5 next day or two. There's no point in hearing from you now.
6 That's why I'm giving you an opportunity.

7 My thinking may be helpful to you also -- not
8 necessarily helpful to your cause, to your motion, but at least
9 giving you some preview of some of the authorities that we've
10 looked at in the last couple of days. So that's the way things
11 will stand. Thank you.

12 MR. AFRASIABIA: Your Honor, can I get one
13 clarification on the state law claim?

14 THE COURT: Yes.

15 MR. AFRASIABIA: Is the court saying that the state
16 law claim needs to be pursued somewhere else, regardless of the
17 outcome of the copyright claim?

18 THE COURT: First of all, I intend to bifurcate the
19 state claim, so even if the summary judgment is not granted and
20 for some reason there's an aspect of the safe harbor defense --
21 because I've already found you made a prima facie direct
22 copyright case -- if that goes forward -- it would only go
23 forward on the copyright claim and probably just a safe harbor
24 defense, which would be the defendant's burden. Having
25 bifurcated the fourth claim, undoubtedly, in my view, since

1 that fourth claim is not substantially related to the three
2 claims that are a -- federal question claims, I wouldn't
3 exercise supplemental jurisdiction. So if that helps your
4 thinking, that's the thinking.

5 MR. AFRASIABIA: It does. And the order that you
6 issue, is it going to say that you are choosing not to exercise
7 supplemental jurisdiction?

8 THE COURT: Yes, yes. Thank you.

9 MR. AFRASIABIA: Thank you, Your Honor.

10 MR. RICHMAN: Thank you, Your Honor.

11 (Proceedings concluded at 2:18 p.m.)

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C E R T I F I C A T E

I hereby certify that the foregoing is a true and
correct transcript from the stenographic record of
the proceedings in the foregoing matter.

October 3, 2013

/S/ _____

Deborah K. Gackle
Official Court Reporter
CSR No. 7106

Date

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<p>H</p> <p>had [4] 3/13 3/18 4/25 6/16</p> <p>hand [1] 8/4</p> <p>harbor [6] 4/12 4/12 4/19 8/7 9/20 9/23</p> <p>has [3] 3/16 5/4 7/22</p> <p>hasn't [1] 8/1</p> <p>have [8] 4/14 4/14 4/20 4/24 5/13 7/17 7/19 7/24</p> <p>having [2] 7/19 9/24</p> <p>head [1] 6/6</p> <p>hearing [4] 7/21 8/14 8/19 9/5</p> <p>helpful [2] 9/7 9/8</p> <p>helps [1] 10/3</p> <p>her [1] 6/11</p> <p>here [1] 3/24</p> <p>hereby [1] 11/3</p> <p>his [1] 6/11</p> <p>holder [2] 3/23 7/2</p> <p>Honor [6] 3/7 3/11 8/15 9/12 10/9 10/10</p> <p>HONORABLE [1] 1/5</p> <p>how [3] 6/22 7/6 7/16</p>	<p>J</p> <p>JUDGE [1] 1/5</p> <p>judgment [9] 4/15 7/20 7/25 7/25 8/4 8/6 8/12 8/22 9/19</p> <p>judgments [1] 4/17</p> <p>jurisdiction [2] 10/3 10/7</p> <p>just [3] 6/15 8/21 9/23</p> <p>K</p> <p>key [1] 7/7</p> <p>knowledge [5] 4/24 4/25 5/3 5/5 6/18</p> <p>L</p> <p>last [2] 7/11 9/10</p> <p>law [2] 9/13 9/16</p> <p>least [2] 5/15 9/8</p> <p>legal [1] 8/24</p> <p>less [1] 6/8</p> <p>let [2] 4/18 8/20</p> <p>level [1] 6/6</p> <p>light [2] 5/1 7/24</p> <p>LIMITED [2] 1/7 3/5</p> <p>litigated [1] 5/7</p> <p>litigating [1] 8/22</p> <p>litigation [1] 4/11</p> <p>LLP [1] 2/7</p> <p>looked [1] 9/10</p> <p>LOS [4] 1/16 1/24 2/18 3/1</p> <p>love [1] 8/8</p> <p>M</p> <p>MacArthur [1] 2/8</p> <p>made [3] 7/22 8/1 9/21</p> <p>make [2] 8/6 8/12</p> <p>mandatory [1] 5/21</p> <p>marks [1] 5/11</p> <p>material [3] 5/6 5/11 7/4</p> <p>matter [1] 11/5</p> <p>may [1] 9/7</p> <p>me [6] 3/16 4/16 4/18 8/6 8/20 9/2</p> <p>mean [2] 5/23 5/24</p> <p>means [2] 4/11 9/1</p> <p>measures [1] 6/20</p> <p>member [4] 5/25 6/3 6/4 6/10</p> <p>members [3] 6/1 7/13 7/14</p>	<p>O</p> <p>obvious [1] 4/20</p> <p>occurred [2] 4/6 4/22</p> <p>October [1] 11/7</p> <p>off [1] 6/6</p> <p>Official [1] 11/9</p> <p>on [13]</p> <p>one [5] 2/7 4/6 6/15 6/16 9/12</p> <p>onellp.com [1] 2/10</p> <p>ones [1] 6/14</p> <p>only [3] 3/18 6/1 9/22</p> <p>onto [2] 3/19 7/6</p> <p>opportunity [2] 8/5 9/6</p> <p>opposition [1] 8/18</p> <p>or [13]</p> <p>order [2] 8/23 10/5</p> <p>Oringer [1] 2/17</p> <p>other [5] 3/25 4/2 4/9 7/1 8/4</p> <p>ought [1] 8/6</p> <p>our [1] 3/13</p> <p>out [1] 9/4</p> <p>outcome [1] 9/17</p> <p>own [1] 6/11</p> <p>owners [1] 6/21</p>
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